152 U.S. 695
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RECORD, CASE No. 14,358.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

TERM No., 312.

CHARLES C. WORTHINGTON AND WILLIAM A. PERRY, PLAINTIFFS IN ERROR,

vs.

THE CITY OF BOSTON.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

FILED OCTOBER 20, 1890.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 24, 1893.

1 *Writ of Error.*

[Seal of the Circuit Court, Massachusetts.]

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the district of Massachusetts, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, between Charles C. Worthington and William A. Perry, of the city, county, and State of New York, citizens of the State of New York, plaintiffs, and The City of Boston, a municipal corporation duly organized and existing under the laws of the State of Massachusetts and located in said district, defendant, in an action of contract, a manifest error hath happened, to the great damage of the said plaintiffs, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done herein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the twenty-fourth day of May, in the year of our Lord one thousand eight hundred and ninety.

JOHN G. STETSON,
Clerk of the Circuit Court of the United States,
District of Massachusetts.

Allowed by—
LE BARON B. COLT,
U. S. Circuit Judge.

2 *Return on Writ of Error.*

CIRCUIT COURT OF THE UNITED STATES, *District of Massachusetts,* } *ss:*

And now, here, the judges of the circuit court of the United States in and for the district of Massachusetts make return of this writ by annexing hereto and sending herewith, under the seal of the said circuit court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

Seal of the Circuit Court, Massachusetts.

In testimony whereof I, John G. Stetson, clerk of said circuit court of the United States in and for the district of Massachusetts, have hereto set my hand and the seal of said court this first day of October, A. D. 1890.

JOHN G. STETSON, *Clerk.*

3 UNITED STATES OF AMERICA, *Massachusetts District*, } ss:

At a circuit court of the United States for the first circuit, begun and holden at Boston, within and for the district of Massachusetts, on Tuesday, the fifteenth day of October, in the year of our Lord one thousand eight hundred and eighty-nine, before the Honorable Le Baron B. Colt, circuit judge.

CHARLES C. WORTHINGTON and WILLIAM A. PERRY, of the City, County, and State of New York, Citizens of the State of New York and Surviving Partners of the Late Firm Doing Business under the Firm Name and Style of Henry R. Worthington, Dauphin S. Hines, Formerly a Member of said Firm, Having Deceased, Plaintiffs,

v.

THE CITY OF BOSTON, a Municipal Corporation Duly Organized under the Laws of the State of Massachusetts and Located in the District of Massachusetts, Defendant.

4 In an action of contract. *Ad damnum*, $100,000.

Declaration.

(Filed Sept. 17, 1886.)

And plaintiffs say that they are the surviving members of the firm of Henry R. Worthington; that plaintiffs under said firm name entered into an agreement in writing with the defendant, a copy whereof, so far as the same is material, is hereto annexed, marked "X;" that plaintiffs entered upon the execution of said agreement and in all respects complied with its terms, and at the time of the commencement of this action had proceeded so far with the completion thereof that the engines therein mentioned had been erected in plaintiffs' works and plaintiffs were ready and willing and offered to deliver said engines and the machinery and appurtenances mentioned in said contract to defendant, as provided therein, and to proceed with said contract under the terms thereof, and to complete and finish all things on plaintiffs' part to be done thereunder, and had notified defendant corporation thereof, but the defendant refused to allow plaintiffs to complete said contract and notified plaintiffs that they would not allow said boilers, engines,

5 machinery, and appurtenances to be delivered, set up, and completed, as by said contract provided, and would not receive or accept or pay for said engines, boilers, machinery,

and appurtenances, as in said contract provided, and defendant has neglected and refused to perform its part of said agreement, to the great loss and damage of plaintiffs.

Second count. And plaintiffs further say that they made a contract in writing with the defendant, a copy of the material parts of which is annexed to the first count.

That plaintiffs entered upon the execution of said contract and the construction of the engines, boilers, machinery, and appurtenances therein mentioned and in all respects complied with the terms thereof; that prior to the commencement of this suit the steam cylinders and the water cylinders of the engines had been cast, and the steam cylinders of the engines had been bored and planed, and both engines had been erected in plaintiffs' works, all as provided in and in accordance with the terms of said agreement, of all of which the defendant had knowledge and due notice from plaintiffs.

That upon completion of said several stages of the work there became due and payable under the terms of said contract by
6 the defendant divers sums of money, to wit, $21,315.00 (being twenty per cent. of the contract price) when the steam cylinders of the engines had been cast, $15,986.25 (being fifteen per cent. of the contract price) when the water cylinders of the engines had been cast, $15,986.25 (being fifteen per cent. of the contract price) when the steam cylinders of the engines had been bored and planed, and $15,986.25 (being fifteen per cent. of the contract price) when both engines had been erected in plaintiffs' works.

That plaintiffs are entitled to said divers sums under said contract, but defendant has neglected and refused to pay same, although often requested so to do.

By their attorneys, MORSE & ALLEN.

"X."

City of Boston, Boston water works.

Contract and Specifications.

High-service pumping machinery.

This agreement made and concluded this nineteenth day of May, in the year one thousand eight hundred and eighty-five between the city of Boston, by the Boston water board of the first
7 part, and a copartnership doing business under the name of Henry R. Worthington of New York in the State of New York, party of the second part.

A. Witnesseth, that for and in consideration of the payments and agreements hereinafter mentioned, to be made and performed by the said party of the first part and under the penalty expressed in a bond bearing even date with these presents and hereunto annexed, the said party of the second part agrees with the said party of the first part to construct and finish in the most substantial and workmanlike manner and to erect in the high-service pumping sta-

tion to be built by the party of the first part at Chestnut Hill reservoir so called in the city of Boston, and on foundations to be provided by the said party of the first part, two high-duty pumping engines, with boilers and all appurtenances complete and ready for use, the same to be built in accordance with, and as described in the specifications herein embodied, and also in strict fulfil-ment of the terms of this agreement.

B. Whenever the words "water board" are used in this contract, they shall be understood to mean the Boston water board of
8 the city of Boston, or any committee or board duly authorized — the said city in the execution of the work covered by this contract. Whenever the word "city" is used herein it shall be understood to mean the city of Boston; and whenever any power is possessed by, or any act or thing is to be done by said "city" under this contract, the exercise of such power and the doing of such act or thing by said water board shall be a sufficient compliance with the terms of this contract, unless by law, or the ordinances, or orders of said city, some other officer thereof is required to act in the premises. Whenever the word "engineer" is used herein it shall be understood to mean the city engineer, or his properly authorized agents, limited by the particular duties entrusted to them. Whenever the word "contractor" is used herein, it shall be understood to mean the party of the second part, or his or their legal representatives.

R. On condition of the true and faithful performance of all the provisions of this agreement, and the accompanying specifications, the pumping machinery, boilers, and all their appurtenances now located in the Highland pumping station so called in the city of Boston, is to become the property of the contractor, and the
9 city further agrees to pay to the said contractor the sum of one hundred and six thousand five hundred and seventy-five dollars ($106,575.00) the same to be in full payment for all work, material and supplies indicated in this contract, embracing the perfect and satisfactory construction of such work as is defined and described in said specifications, in all parts and requirements.

And it is hereby understood and agreed that if any parts or details necessary — action of the work be omitted, the same shall be supplied or corrected with the knowledge and advice of the engineer, without additional charge, the above sum being for furnishing and erecting the work of the character indicated, complete and serviceable in all respects.

S. The parties hereto agree that the before-mentioned sum shall be paid in the following manner.

A payment of twenty (20) per cent. of the contract price to be made when the steam cylinders of the engines have been cast.

A payment of fifteen (15) per cent. of the contract price to be made when the water cylinders of the engines have been cast.

10 A payment of fifteen (15) per cent. of the contract price to be made when the steam cylinders of the engines have been bored and planed.

A payment of fifteen per cent. of the contract price to be made when both engines have been erected in the contractor's works.

A payment of fifteen (15) per cent. of the contract price to be made when the boilers and engines have been delivered at the pumping station, at Chestnut Hill reservoir, in the city of Boston.

* * *

In witness whereof the parties to these presents have hereunto set their hands and seals the year and day first above written.

For the city of Boston, by the chairman of the Boston water board.

W. A. SIMMONS. [SEAL.]
HENRY R. WORTHINGTON. [SEAL.]

Signed and sealed in the presence of—
WILLIAM JACKSON.
DANIEL H. JOHNSON.

11 The writ in this cause is dated the seventeenth day of February, A. D. 1886, and was duly entered at the May term of this court, A. D. 1886, when and where the parties appeared, by their respective attorneys. This cause was thence continued to the October term, A. D. 1886, when the following answer was filed:

Answer.

(Filed Nov. 26, 1886.)

And now comes The City of Boston, the defendant in the above-entitled action, and for answer denies each and every allegation, item, and particular of the plaintiffs' writ and declaration and each and every count thereof.

BY THE CITY SOLICITOR,
Per AMES.

This cause was thence continued from term to term to the October term, A. D. 1888, when the following agreed statement of facts was filed:

12 *Agreed Statement of Facts.*

(Filed April 5, 1889.)

This is an action of contract to recover damages for breach of a contract dated May 19, 1885, in which the writ is dated Feb. 17, 1886, and the parties agree to the following facts, so far as they are material, competent and relevant:

First. That the city of Boston was previous to 1875, and ever since has been, authorized to take water from Lake Cochituate, called also Long pond, Sudbury river and Mystic lake, build and maintain aqueducts, dams, reservoirs, lay pipes, establish hydrants, and supply its inhabitants with water in such manner and by such agents, officers and servants as the city council shall from time to time ordain, appoint and direct, and previous to the year 1875 had

established the Cochituate water board and the Mystic water board to exercise these powers, subject to the ordinances and orders of the city.

Second. Chapter 80 of the Statutes of Massachusetts of the year 1875, so far as it is material in this case, is as follows:

"The city council of the city of Boston may establish by ordinance a water board to be known as the Boston water board, consisting of three able and discreet persons to be appointed by
13 the mayor, with the advice and consent of the city council, and to receive such compensation as the city council may from time to time determine. The said board may be empowered by said city council to exercise all or any of the powers conferred by the statutes of the Commonwealth upon the city of Boston, with reference to supplying said city with water, or of the Cochituate and Mystic water boards, and also to act as the agent of the city of Boston in doing any and all things which the city is now authorized to do in relation to the taking of lands, water rights and other property, and the establishment and maintenance of works and appliances for supplying the city of Boston or other cities and towns with pure water, and the said Boston water board shall, so far as the city council of said city may by ordinance prescribe, succeed to all the powers and duties formerly vested in the Cochituate water board and Mystic water board."

Third. The city council of said city, with the approval of the mayor, on the twenty-second day of March, 1876, passed an ordinance which continued in force until after the time of making the contract declared on, the parts of which material to this case are as follows: "There shall be a board to be known as the Boston water board and to consist of three members. Said board shall have and exercise all the powers so far as such powers can be legally delegated by the city council, which were granted to the city by or are held by the city under chapter one hundred and sixty-seven of the statutes of the Commonwealth of the year eighteen hundred and forty-six, chapter one hundred and seventy-seven of the said statutes of the year eighteen hundred and seventy-two, and by or under any and all statutes in addition to either of the before-mentioned chapters, subject, however, to the authority of the city council from time to time, by ordinances, orders or resolutions, to instruct said board, and to change and limit their powers.

Said board may, subject to the approval of the mayor, sell or lease such of the property connected with the water works as they deem expedient, and all necessary deeds and leases shall be executed by the mayor and countersigned by the chairman of said board.

No contract or purchase which is estimated to involve an expenditure of more than ten thousand dollars, except a contract
14 for the laying of pipe, shall be made by the said board until they have advertised, as hereinafter provided, for sealed proposals therefor. When advertisements for such proposals are made, plans and specifications of the work to be done, and schedules of the materials or supplies to be furnished shall be placed on file in such office as may be designated by said board, and shall at all

times during office hours be open to public inspection. The advertisement shall in all cases be inserted not less than five times in each of three newspapers published in the said city; and it may be inserted also, if said board deem it expedient, in newspapers of other cities or towns, and the last publication shall be at least one week before the time fixed for opening the proposals. Each proposal shall conform to the specifications and requirements of the advertisement, shall be inclosed in a sealed envelope addressed to said board, and shall be accompanied by a bond to the city with sufficient sureties in such sum not less than five hundred dollars as said board may specify in their advertisement and conditioned to be void if the party making the proposal shall, in case of the acceptance of his bid, sign and deliver to said board within the time required in their advertisement a contract for the performance of the subject-matter of his proposal; and if he shall also, at the time of the delivery of such contract, give a further bond with satisfactory sureties for the performance of such contract. But instead of the before-mentioned bond to accompany a proposal, a deposit of money or other collateral satisfactory to said board may be made as security for the signing and delivery of the contract and of the bond for the performance thereof. For the performance of the contract a bond with sureties shall in all cases be required when the contract is signed and delivered. All proposals shall be publicly opened at the time and place designated in the advertisement, and the said board may reject any or all bids which are offered, and it shall be their duty to reject the bids of all irresponsible parties."

Fourth. The Cochituate water department comprises that part of the city water works which is employed in supplying the city with water from Lake Cochituate and Sudbury river to Chestnut Hill reservoir, the aqueducts from said sources to and the pipes supplied from the reservoir, and the pumps, machinery, etc., appurtenant thereto, and for several years prior to 1884 the matter of extending the high-service works of the Cochituate department was before the city council.

Fifth. In 1881, the Boston water board submitted to the city council an estimate as follows of the cost of such extension:

For engine buildings, wells, engine foundations, etc..	$149,000 00
one engine, capacity 10,000,000 gallons.....	75,000 00
one relief engine, capacity 5,000,000 gallons	18,000 00
(Based on using one of Mystic pumping engines.)	
lands and reservoir (No. 1), capacity 15,000,000 gallons.....	169,000 00
land damages for reservoir (No. 3) and pipe lines.....	28,000 00
pipe mains, force and supply.....	237,000 00
	$676,000 00
Add 10 per cent. for superintendence, engineering, and contingencies.....	67,600 00
Total	$743,600 00

On Nov. 17, 1884, the Boston water board submitted to the city council another estimate, as follows, of the cost of such extension:

For engine buildings, wells, engine foundation, connection chamber	$142,000 00
one engine, capacity 10,000,000 gallons	60,000 00
one relief engine, capacity 5,000,000 gallons	25,000 00
land and reservoir, capacity 15,000,000 gallons, including gate chamber	210,000 00
land damages for reservoir No. 3	28,000 00
pipe mains, force and supply	231,000 00
	$696,000 00
Add 10 per cent., engineering and contingencies	69,600 00
Total	$765,600 00

Sixth. On Dec. 23, 1884, the following order, duly passed by the city council, was approved by the mayor:

16 "Ordered: That the city treasurer be authorized to borrow, under the direction of the committee on finance, and at such a rate of interest as they shall determine, the sum of $766,000, which sum is hereby appropriated, and the Boston water board is authorized to expend the same for the extension of the high-service works of the Cochituate water department."

Seventh. On Dec. 31, 1884, the city engineer, Henry M. Wightman, addressed to the water board a letter, in which he said:

"The board should determine the pumping engine it will use, as such determination is necessary before a plan of the pumping station can be made. I am of the opinion that the improved Worthington engine will prove the most advantageous for the city, and as a three-million-gallon engine of this type is running at the Worthington pump works in New York, it would be advisable for the board to examine this engine before any decision is made."

Eighth. The water board adopted plans and specifications for said extension, requiring, among other things, two engines of the daily capacity of five million and ten million gallons respectively, estimated by said board to cost from $85,000 to $93,000, the discontinuance of the pumping station on Elmwood street, at the Highlands, and the engines and machinery therein; and on the third day of April, 1885, the Boston water board sent the following communication to the city council:

"The plans for the extension of high service, as detailed by ex-City Engineer Joseph P. Davis, and the late city engineer, Henry M. Wightman, require the establishment of a new pumping station at Chestnut Hill of larger capacity than the present one, at the Highlands, and the discontinuance of the latter. Mr. Wightman, after a careful examination of the matter, concluded that it would be advantageous for the city to exchange if possible the small engines now in use for the larger ones required in the extension of the high service, and so recommended to the board. We therefore ask 'That

the water board be authorized to exchange such pumping engines and machinery as are inadequate or of insufficient capacity for those of the capacity required by the plans and estimates of the new high-service extension.'"

17 Ninth. On April 20, 1885, the following order, prepared by the chairman of the water board, and which had duly passed both branches of the city council, was approved by the mayor:

"Ordered: That the water board be authorized to exchange such pumping engines and machinery as are inadequate or of insufficient capacity for those of the capacity required by the plans and estimates of the new high-service extension, the expense of such exchange to be charged to the appropriation for high-service extension."

Tenth. Said water board never advertised in any manner for proposals for contracting for or furnishing the engines, boilers and appurtenances required by the plans and specifications for the new high-service extension.

Eleventh. On April 21, 1885, the water board visited New York and examined the improved or high-duty Worthington engine and other engines in New York, Philadelphia and Brooklyn, all of which they had done several times before since Jan. 1, 1885, and on the previous visits had been accompanied by the city engineer; and on April 24, 1885, received from the plaintiffs the following proposal, sent at the suggestion of the chairman of the water board in accordance with the recommendation of the city engineer as set forth in the seventh clause:

"We beg leave to submit the following proposal: For $106,575, will furnish and erect the pumps, etc., ready for continuous service. Whole to the satisfaction of the city engineer, and under such specifications as to details as may hereafter be agreed upon.

Above price on assumption that we are to receive other engines and boilers on Elmwood street. Boilers according to specifications accompanying. Also feeding apparatus. We guarantee 100,000,000 foot pounds with 100 pounds of coal. Also materials and labor shall be first class and equal to any other work furnished by us. We agree to complete work in eight months from date of signing contract.

Very respt., HENRY R. WORTHINGTON."

On the same day the water board voted to return, and did return, the following answer:

18 "Your proposal of April 24, 1885, to furnish high-service pumping plant for the city of Boston for the sum of one hundred and six thousand five hundred and seventy-five dollars ($106,575) is hereby accepted under the conditions that the detailed specifications and terms of the contract for the above-mentioned work shall be satisfactory to both parties concerned in the said proposal. It being understood that the present pumping plant at the Elmwood station is to be exchanged, as per the terms of your proposition."

The "other engines and boilers" and "pumping plant" above

referred to were all the engines and machinery of the pumping station on Elmwood street, at the Highlands, which were to be discontinued, and consisted of one small low-duty Worthington engine, made in 1878, and of the daily capacity of 3,000,000 gallons, and one engine and two boilers made by the Boston Machine Company, said engine being made in 1870, and of the daily capacity of 1,800,000 gallons, all of the aggregate value of thirty-five hundred (3,500) dollars.

The pumps referred to in the proposal and acceptance to be furnished by the plaintiffs were two Worthington high-duty engines of the daily capacity of five million and ten million gallons respectively.

Twelfth. The distinguishing characteristic of the improved or high-duty Worthington engine is a patent "high-duty" attachment, the patent of which is owned and used exclusively by the plaintiffs. This device, so far as the parties to this suit know, is the only device beside a fly-wheel which secures high economy of steam and fuel by enabling the steam to be cut off from the cylinder at an early point in the stroke of the piston without causing a loss of speed; the effect of plaintiffs' device and of the fly-wheel, together with the expansion of the steam left in the cylinder, being to carry the piston through the remainder of its stroke without loss of speed. It avoids the vibration on the wator column incident to the use of a crank and fly-wheel, and can be used on the duplex low-duty Worthington engine the motion of which is such that a fly-wheel cannot be used with it. The duplex high-duty or low-duty Worthington engine is the only form of engine that secures an absolutely steady and regular flow of water, and whose steadiness and regularity of flow is in no way dependent on speed, and the
19 low-duty duplex engine was, Jan. 1, 1885, and ever since has been, manufactured by other parties besides the plaintiffs.

A cut of the engine is hereto annexed with the high-duty attachment at point marked "A," and an explanation of the working of it appears in an extract from a pamphlet published by the plaintiffs, which extract is hereto annexed as "Exhibit A."

Thirteenth. The plaintiffs, though knowing to the ordinance hereinbefore cited requiring advertisements, were informed by the chairman of the Boston water board that the order above cited of April 20, 1885, avoided any necessity of advertising in this case; and on May 19, 1885, the Boston water board, in the name of the defendant, and claiming to act in its behalf, and whose whole authority in the premises, if any it had, was derived from the orders, ordinances and statutes, as hereinbefore stated, and the plaintiffs entered into a contract the material portions of which were that said plaintiffs should make and erect at Chestnut Hill reservoir two high-duty pumping engines, one of ten million and one of five million gallons daily capacity, and the boilers and appurtenances for the same; that the defendant should pay the plaintiffs therefor the sum of $106,575, and the pumping machinery, boilers and all their appurtenances then located in the Highland pumping station, and valued at $3,500, were to become the property of the plaintiffs.

The provisions of the contract in regard to payments were at follows:

"Clause S. A payment of twenty per cent. of the contract price to be made when the steam cylinders of the engines have been cast.

A payment of fifteen per cent. of the contract price to be made when the water cylinders of the engines have been cast.

A payment of fifteen per cent. of the contract price to be made when the steam cylinders of the engines have been bored and planed.

A payment of fifteen per cent. of the contract price to be made when both engines have been erected in the contractor's works.

A payment of fifteen per cent. of the contract price to be made when the boilers and engines have been delivered at the pumping station at Chestnut Hill reservoir, in the city of Boston.

Said payments to be made on or about the first day of the month after each item of work before designated has been done; provided, that such payments shall not be made nor demanded unless the work is progressing faithfully and to the satisfaction of the city engineer.

It is also understood and agreed that such payment shall not relieve the contractor of the full responsibility for building and completing the work in accordance with this contract, in case any of the work so estimated and paid for should become lost or destroyed by any cause whatever.

The balance of the money due to the contractor will be paid, and the pumping machinery before mentioned as at the Highland pumping station will become the said contractor's property upon the completion of the entire work according to the terms of this agreement, and its connection to the high-service system of the city of Boston, all to the satisfaction of the said engineer."

On the same date a bond in the sum of $25,000, with sureties, running to the city of Boston, was delivered to the Boston water board to secure the faithful performance of the contract by the plaintiffs; the bond was accepted for the city of Boston by the Boston water board and attached to the contract, and is now in the possession of the city auditor.

Fourteenth. The pumping engines and machinery called for by said contract were of a capacity required by the plans and specifications for the new high-service extension, and were capable of doing the work contemplated by the orders of Dec. 23, 1884, and April 20, 1885. The expenditure for piping was less than the estimate therefor, and the whole amount expended and agreed to be expended for the new high-service extension by the said water board did not exceed the whole sum appropriated therefor.

Fifteenth. Said plaintiffs, before the commencement of this action, had performed the work described in the first four paragraphs of clause S of the contract, and had notified the defendant that they were ready and willing to deliver the engines and boilers, and perform the remainder of the work described in the contract; but the defendant had refused to receive the same, or pay any of the instalments named in said contract, although requested so to do, and

had notified the plaintiffs that it would not allow said engines and boilers to be delivered, and would not pay for the same.

Sixteenth. In the year 1877, the Boston water board and Henry R. Worthington contracted for an engine, at a cost of $20,000, without advertising therefor, and the price stipulated therein was paid by said city.

Seventeenth. The damages sustained by the plaintiffs by not completing and delivering said engines and boilers, and receiving the payment provided therefor, are $35,000; and if, on the
21 above facts, the defendant is liable in this action, judgment shall be entered for the plaintiffs in that sum, with interest from the fifteenth day of April, 1889; otherwise judgment for the defendant.

MORSE & ALLEN,
Attorneys for Plaintiffs.
ANDREW J. BAILEY,
Attorney for Defendant.

EXHIBIT A.

The Worthington High-duty Pumping Engine.

The terms "high duty" and "low duty," as applied to pumping engines, are used mainly to distinguish between two different grades of performance with reference to the consumption of fuel. In submitting propositions for furnishing pumping machinery for water works, "low duty" is, generally speaking, held to comprise engines upon which a guarantee of duty is made of from fifty million to seventy million pounds of water raised one foot for each one hundred pounds of coal burned. "High duty" comprises engines of a guaranteed duty of from ninety-five millions to one hundred and ten millions, and slightly above. All other things being equal, the great object in view in pumping water is to do the work with the least practicable consumption of fuel, which in turn simply means the least possible steam used by the engine. The most steam is used by a pumping engine when the steam follows the pistons from the beginning to the end of their stroke without any expansion whatever. The least steam would be used when the inlet valves close, and are caused to "cut off" the steam at the earliest point in the stroke consistent with surrounding conditions. Steam following the piston "full stroke" means the largest consumption in proportion to work done. Theoretically, the highest practicable expansion of steam means the greatest economy. The load upon, or resistance to, a pumping engine is uniform, and therefore the propulsive energy of the machine must be practically uniform, either directly by virtue of the action of steam upon the pistons, or if the impulse of the steam is variable, its excesses and deficiencies must be made good by the mechanism of the engine itself,

The Worthington duplex pumping engine, although so
22 widely used in water-works stations for the past thirty years, was, owing to peculiarities not necessary now to discuss, com-

paratively limited in its capabilities of expanding steam, but even to-day, in view of the fact that higher duty in a pumping engine means higher first cost and often increased liability to derangement, it is more largely employed than any other type in existence. This limited steam expansion relegates the Worthington engine of the past to the class of "low-duty" machinery of to-day, although up to within a few years it ranked higher in duty than any pumping machinery in the market. In expanding steam to an extent that will secure a duty of one hundred millions of foot pounds, the variable impulse of the steam during the piston's stroke makes imperative the demand for some means for reducing the wide variations of steam pressure to a uniform level. The problem presenting itself is this: At the beginning of the stroke the impulse of the steam upon the pistons is far in excess of that demanded for moving the load; at the terminus of the stroke the impulse of the steam is very much less than what is required; the mean pressure during the stroke is sufficient, but the inequalities must be instantly equalized when they occur, or else the engine will start with a violent plunge, and stop short of the end of its stroke at a point where the driving forces sink below what is demanded by the resistance. In the crank and fly wheel engine this equalizing effect is brought about by a ponderous fly-wheel, which absorbs by its inertia the excess of energy at the beginning of the stroke, and gives it out at the end. In other words, the steam impulse upon the pistons in excess of what is actually required to move the load at the beginning of the stroke is expended in inertia in trying to increase the speed of the fly-wheel; while near the end of the stroke, when the expansion of the steam in the cylinders carries the pressure below a point that will balance the resistance, the load is moved along by the momentum of the fly-wheel, the result being that the steam action is made uniform through the medium of the fly-wheel.

In the Worthington high-duty engine the same effects of high steam expansion are obtained, but the uniform distribution of the steam pressure is secured by an entirely different method, much simpler and more effective, and embracing none of the objections of the fly-wheel, and presenting many positive advantages.

23 While it has become generally admitted that the Worthington duplex engine possesses to a degree not approached by any other type the important advantages of reliability, ease of management and simplicity, it has at the same time been apparent that further improvement in the direction of its economy in the consumption of fuel was becoming a necessity if its advanced position was to be maintained. It is conceded that this engine could not attain as high a duty as has in recent years been achieved in a few instances by more expensive engines of the crank and fly-wheel type, although its annual record, based on coal consumed in regular running, has rarely been surpassed. But the possibility of still further improving its economy, and of thus placing it unquestionably in the foremost rank of pumping engines, has always been recognized by those engaged in its manufacture, and has led them to

direct their attention for some years to such modifications in its constructions as promised to effect the desired results.

Expansion by means of compound cylinders alone had apparently been carried in this engine to its practical economic limit, with such steam pressure as is usually employed. What remained to be gained from it further could be secured only at the expense of certain features of construction that were most desirable to retain.

Some means, therefore, were to be devised by which the gain in efficiency, due to cutting off and expanding the steam in each cylinder by itself, could be secured. To accomplish this through the usual medium of a fly-wheel, or other device wherein the momentum of a moving mass is utilized for the storing and imparting of energy, would be to rob the engine at once of those distinguishing characteristics and advantages that had given it its reputation. To make this change, in short, would be to abandon entirely the duplex principle.

A better method suggested itself, and one that has proved eminently successful. By means of a most simple attachment, greatly increased economy in running has been secured, while, so far as its construction or the quality of its action is concerned, the engine is left unchanged.

This improvement marks a most important and radical advance in the position and history of the direct-acting engine. It
21 lifts it at once from the plane of a low-duty engine and places it alongside, and perhaps in advance of, such engines as have attained the highest duties yet recorded. Instead of the engine being confined, as heretofore, to an expansion of steam due to the relative areas of the cylinders, it can now be run at such ratio as is found to be the most economical. In other words, any point of cut-off in its cylinders may be used.

The attachment is shown at "A" in the cut.

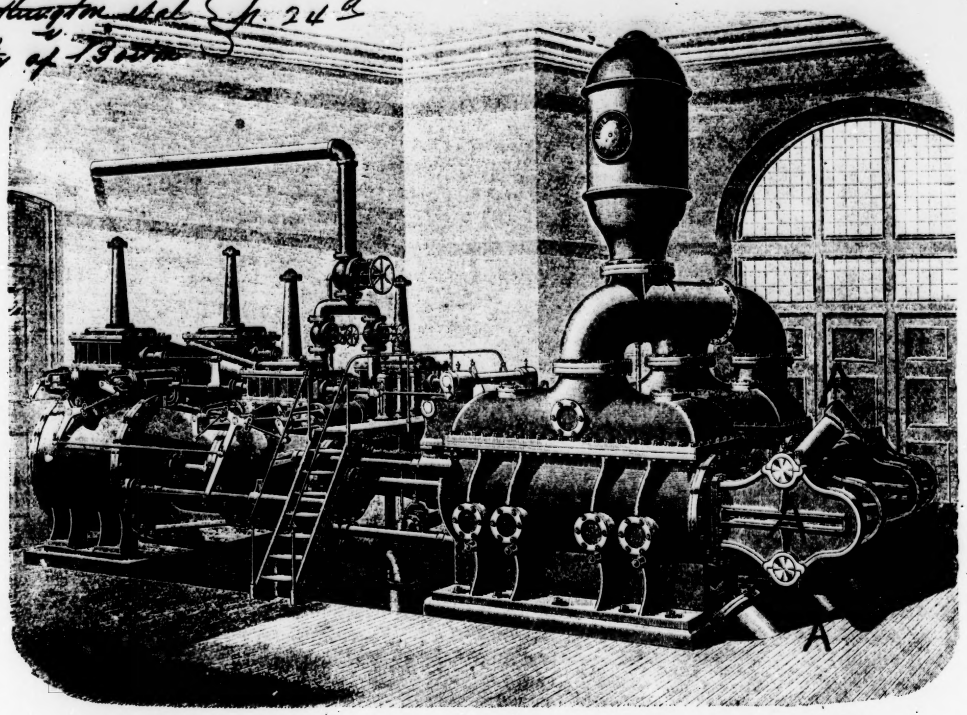
(Here follows cut marked p. 24*a*, "the Worthington high-duty pumping engine.)"

It consists, briefly, of two small oscillating cylinders attached to an extension of the plunger rod of the engine, preferably beyond the water end. These cylinders and their connecting pipes are filled with water or other liquid and connected, through the medium of an accumulator, with the water in the force-main of the pump. By this means a pressure on the pistons in these cylinders is maintained exactly equal to, or in proportion to, that in the force-main. These pistons act in such a way with respect to the motion of the engine as to resist its advance at the commencement of the stroke, and assist it at the end, the water in the force-main meanwhile exerting upon them a constant pressure at each point of the stroke.

The two cylinders act in concert, and, being placed directly opposite each other, relieve the cross-head to which they are attached, of any sliding frictional resistance, and the engine of any lateral strain.

By alternately taking up and exerting power through the differ-

No. 312.
Worthington Steel } Sp. 24 a
City of Boston



ence in the angle at which their force is applied with respect to the line of motion of the plunger rod, these two cylinders in effect perform the functions of a fly-wheel, but with the important mechanical difference that they utilize the pressure in the force-main instead of the energy of momentum. Whatever pressure is in the force-main is directly communicated to the compensating cylinders, and any variation in the force-main pressure is followed instantly by a corresponding variation in the cylinder pressure. Thus a uniform relation is maintained between the load on the pump plungers and the work performed by the compensators.

Their action is readily controlled, and their power is automatically proportioned to the work to be overcome, and is entirely unaffected by the speed of the engine. The same amount of expansion can be obtained in the same engine whether running at a piston speed of ten feet per minute, or at one hundred and fifty. This latter feature is one of great importance, affecting, as it does so favorably, the economy of the engine when applied on any service where the demand is irregular or intermittent. Where such service is performed by a fly-wheel engine it is a well-known fact that the best economic results are obtained only when the engine is running at nearly its full rated capacity, and that its economy rapidly falls as its speed is decreased. With every change in the rate of rotation of the fly-wheel a corresponding change in the point of cut-off must be made. When the speed is decreased the steam must be made to follow further in the stroke of the piston, thus reducing the expansion, and consequently the efficiency of the engine.

There are many fly-wheel engines throughout the country on the direct-pressure or stand-pipe systems of supply that are obliged to run so slowly when delivering the quantity of water demanded by the service as to necessitate the steam being carried nearly full stroke. As a result, their practical duty often falls below fifty million (50,000,000) foot pounds, although they may be capable of showing a much higher duty when run at full speed.

This undesirable condition is almost certain to obtain in every direct-pressure-system pumping plant, for the reason that the machinery must be of capacity out of all proportion to the ordinary domestic requirements in order to meet the occasional increased demand of the fire service. To this fact is due, as much as to any one other, the disfavor with which the direct-pressure system is often regarded.

The Worthington high-duty engine meets this objection completely. Its economy is not appreciably affected by the widest differences in its speed, as the rate of expansion in the steam cylinders is constant under all changes in the rate of delivery of the pump. The engine adapts itself exactly to the load; as the pressure in the compensating cylinders varies proportionally with the pressure in the force-main, the result is a uniform propulsion on the water column and an absolute control of the speed of the engine, without dependence being had upon any automatic governor or other com-

plicated device. Should the force-main or distributing pipes
26 burst from any cause, no accident can occur to the engine itself, as the loss of pressure in the main results in a corresponding loss of power in the compensating cylinders, until, when the pressure is entirely withdrawn from them, the engine is unable to complete its strokes.

The work of the compensating cylinders can, at the will of the attendant, be thrown on or off the engine instantaneously. Should they or the cut-off mechanism become in any way disarranged, or require overhauling or repairs, they can be quickly disconnected from the engine, which can then be run as economically and satisfactorily as though originally constructed without them.

Where the most economic results are desired, the low-pressure as well as the high-pressure cylinders are provided with cut-off valves. These consist of semi-rotating circular slide-valves placed in the admission ports of the cylinders, and operated by means of the direct connections illustrated in the engravings. As will be seen, their action is secured without the use of any eccentrics, gears or cams. When the point of cut-off has been once fixed, it need never be altered.

Worthington engines with this attachment have been fully tested under all the conditions to be met with in actual practice, and have achieved as high a duty as has heretofore been secured by an engine of any other type. A duty of one hundred million (100,000,000) foot pounds, with the consumption of one hundred pounds of coal, can be considerably exceeded with an engine developing less than one hundred horse power.

27 This cause was thence continued to the May term, A. D. 1889, when the following agreement to amend agreed facts was filed:

Agreement to Amend Agreed Facts.

(Filed June 21, 1889.)

It is agreed to add to end of thirteenth clause of agreed facts:

"On the same date a bond in the sum of $25,000, with sureties running to the city of Boston, was delivered to the Boston water board to secure the faithful performance of the contract by the plaintiffs. The bond was accepted for the city of Boston by the Boston water board and attached to the contract and is now in the possession of the city auditor."

MORSE & ALLEN,
For Plaintiffs.
A. J. BAILEY,
For Defendant.

At the same term the following waiver of jury trial was filed:

28 *Waiver of Jury Trial.*

(Filed June 22, 1889.)

It is agreed that a jury trial has been and is hereby waived, and that the case may be tried by the court without the intervention of a jury.

A. A. RANNEY,
For Plaintiffs.
A. J. BAILEY,
For Defendant.

This cause was thereupon set down for hearing and fully heard by the court upon said agreed statement of facts, and was thence continued, under advisement, to this present term, when, on the eleventh day of January, the opinion of the court is filed ordering that judgment be entered for the defendant.

On the ninth day of May the following bill of exceptions is filed and allowed:

Bill of Exceptions.

(Filed May 9, 1890.)

This case was submitted and heard by the court without the intervention of a jury, a jury trial being waived in writing, signed by the parties and duly filed in the cause, upon the following
29 agreed statement of facts, admitted in writing by the respective parties and found by the court to be true.

NOTE.—Agreed facts heretofore recorded on page 12.

Upon the said statement of the facts the respective counsel made certain requests for rulings and findings as matter of law, on which the court ruled, and exceptions were taken to the same and reduced to writing as follows, viz:

The said plaintiffs claimed and asked the court to rule and hold that they were entitled as matter of law to judgment for the amount of damages agreed upon, with interest. The court declined to so hold and rule, but, on the contrary, held and ruled that the ordinance obliged the board to advertise for proposals, and that it was beyond their power to waive or dispense with this requirement, and that, this not being done, the contract which was made and upon which the plaintiffs rely was void and the defendant entitled to judgment.

The plaintiffs excepted to the refusal of the court to rule and hold that they were entitled to judgment as claimed and requested
30 by them as aforesaid, and to the said ruling and holding in favor of the defendants, and the exception in each case was allowed by the court.

The plaintiffs in particular claimed and asked the court to rule and hold:

1. That the order of April 20, 1885, which passed both branches

of the city council and was approved by the mayor and which authorized the exchange to be made of pumping engines, gave the board authority to make the exchanges contemplated by the contract upon which the plaintiffs rely without advertising for proposals. The court declined so to rule. The plaintiffs excepted, and their exception was allowed.

2. The plaintiffs also claimed and asked the court to hold and rule that the said order of April 20, 1885, had the effect of dispensing with the requirements of the ordinance as to advertising for proposals, in view of the provisions of the ordinance to the effect that the city council might from time to time, by order or resolution, instruct the board and change and limit their powers, and the said order so operating in this particular instance. The court refused to so rule and hold, and the plaintiffs excepted, and
31 their exception was allowed.

3. The plaintiffs contended and asked the court to rule that the provisions of the ordinance in question did not apply to the case in hand, and that the said order of April 20, 1885, coupled with the action appearing, was of itself substantive, comprehensive, and sufficient authority for the making of the contract in question without advertising for proposals; that the action of the city council in the order passed and approved by the mayor presumably and manifestly so regarded the ordinance and proceeded to make independently substantive provisions by said order for the exchange contemplated, not making advertising for proposals absolutely necessary and essential to the validity of the contract to be made.

The court declined to so rule and hold, and the plaintiffs excepted, and their exception was allowed.

4. The plaintiffs claimed and asked the court to hold and rule that while said orders were not designed to repeal and amend the ordinance in general, yet that they served to take the present transaction in particular out of the operation of the same in the
32 respects in question if the same applied.

The court declined to so rule and hold. Plaintiffs excepted, and their exception was allowed.

5. The plaintiffs claimed and asked the court to rule that inasmuch as the Worthington pump determined upon was patented and no one else had the right to make and sell or use the same without the special leave of the plaintiffs, as the sole owner and controller of the patent, and also that inasmuch as the ordinance did not require the acceptance of the lowest or any bid which might be made in case there was an advertisement for proposals, nor require advertisements if all the bids made were rejected, advertising would be useless and futile, and there was no absolute requirement of it as a condition of validity for the contract actually made.

The court declined to so rule in any respect and held the contrary thereof, and the plaintiffs excepted, and their exception was allowed.

The plaintiffs present the foregoing bill and ask to have
33 the same allowed and made to appear of record in said case.

A. A. RANNEY,
MORSE & ALLEN,
Att'ys for Plaintiffs.

The foregoing bill of exceptions, being in conformity with the facts, is allowed and ordered by the court to be made a part of the record in said case.

LE BARON B. COLT,
Circuit Judge.

Judgment.

It is thereupon considered by the court, to wit, May 14, 1890, that the said Charles C. Worthington and William A. Perry, plaintiffs, take nothing by their said writ, and that the said City of Boston, defendant, recover its costs of suit, taxed at —.

A true record.

Attest: JOHN G. STETSON, *Clerk.*

34 The following is the opinion of the court, in accordance with which judgment was entered in favor of the defendant:

Circuit Court of the United States, District of Massachusetts.

CHARLES C. WORTHINGTON *et al.*
v.
CITY OF BOSTON. } No. 2660, Law Docket.

Statement of the Case.

This is an action to recover damages for an alleged breach of contract, dated May 19, 1885. By this contract the plaintiffs were to furnish two high-service pumping engines for the city of Boston for the sum of $106,575. The city of Boston refused to receive the engines on the ground that the Boston water board, through whom the contract was made, had no authority to make any contract involving more than $10,000 without first advertising for proposals, which was not done in this case. It is admitted that the damages sustained by the plaintiffs, if the defendant is liable on the contract, are $35,000. The case can be better understood by referring to some portions of the agreed statement of facts.

The city of Boston was previous to 1875, and ever since has been, authorized to take water from Lake Cochituate, called also Long pond, Sudbury river and Mystic lake, build and maintain aqueducts, dams, reservoirs, lay pipes, establish hydrants, and supply its inhabitants with water in such manner and by such agents, officers and servants as the city council shall from time to time ordain, appoint and direct, and previous to the year 1875 had established the Cochituate water board and the Mystic water board to exercise these powers, subject to the ordinances and orders of the city.

Chapter 80 of the Statutes of Massachusetts for the year 1875, so far as it is material in this case, is as follows:

35 "The city council of the city of Boston may establish by ordinance a water board to be known as the Boston water board, consisting of three able and discreet persons to be appointed by the mayor, with the advice and consent of the city council, and to

receive such compensation as the city council may from time to time determine. The said board may be empowered by said city council to exercise all or any of the powers conferred by the statutes of the Commonwealth upon the city of Boston, with reference to supplying said city with water, or of the Cochituate and Mystic water boards, and also to act as the agent of the city of Boston in doing any and all things which the city is now authorized to do in relation to the taking of lands, water rights and other property, and the establishment and maintenance of works and appliances for supplying the city of Boston or other cities and towns with pure water, and the said Boston water board shall, so far as the city council of said city may by ordinance prescribe, succeed to all the powers and duties formerly vested in the Cochituate water board and Mystic water board."

The city council of said city, with the approval of the mayor, on the twenty-second day of March, 1876, passed an ordinance which continued in force until after the time of making the contract declared on, the parts of which material to this case are as follows:

"There shall be a board to be known as the Boston water board and to consist of three members. Said board shall have and exercise all the powers so far as such powers can be legally delegated by the city council, which were granted to the city by or are held by the city under chapter one hundred and sixty-seven of the statutes of the Commonwealth of the year eighteen hundred and forty-six, chapter one hundred and seventy-seven of the said statutes of the year eighteen hundred and seventy-two, and by or under any and all statutes, in addition to either of the before-mentioned chapters; subject, however, to the authority of the city council from time to time, by ordinances, orders or resolutions, to instruct said board, and to change and limit their powers.

Such board may, subject to the approval of the mayor, sell or lease such of the property connected with the water works as they deem expedient, and all necessary deeds and leases shall be executed by the mayor and countersigned by the chairman of said board.

36 No contract or purchase which is estimated to involve an expenditure of more than ten thousand dollars, except a contract for the laying of pipe, shall be made by the said board until they have advertised, as hereinafter provided, for sealed proposals therefor. When advertisements for such proposals are made, plans and specifications of the work to be done, and schedules of the materials or supplies to be furnished shall be placed on file in such office as may be designated by said board, and shall at all times during office hours be open to public inspection. The advertisement shall in all cases be inserted not less than five times in each of three newspapers published in the said city; and it may be inserted also, if said board deem it expedient, in newspapers of other cities or towns, and the last publication shall be at least one week before the time fixed for opening the proposals. Each proposal shall conform to the specifications and requirements of the advertisement, shall be enclosed in a sealed envelope addressed to said board, and shall be accompanied by a bond to the city with

sufficient sureties in such sum not less than five hundred dollars as said board may specify in their advertisement, and conditioned to be void if the party making the proposal shall, in case of the acceptance of his bid, sign and deliver to said board within the time required in their advertisement a contract for the performance of the subject-matter of his proposal; and if he shall also, at the time of the delivery of such contract, give a further bond with satisfactory sureties for the performance of such contract. But instead of the before-mentioned bond to accompany a proposal, a deposit of money or other collateral satisfactory to said board may be made as security for the signing and delivery of the contract and of the bond for the performance thereof. For the performance of the contract a bond with sureties shall in all cases be required when the contract is signed and delivered. All proposals shall be publicly opened at the time and place designated in the advertisement, and the said board may reject any or all bids which are offered, and it shall be their duty to reject the bids of all irresponsible parties."

The Cochituate water department comprises that part of the city water works which is employed in supplying the city with water from Lake Cochituate and Sudbury river to Chestnut Hill reservoir,
the acqueducts from said sources to and the pipes supplied
37 from the reservoir, and the pumps, machinery, etc., appurtenant thereto, and for several years prior to 1884 the matter of extending the high-service works of the Cochituate department was before the city council.

In 1881, the Boston water board submitted to the city council an estimate of the cost of such extension, amounting to $743,600.00.

On Nov. 17, 1884, the board submitted to the city council another estimate of the cost of such extension, amounting to $765,600.00.

On Dec. 23, 1884, the following order, duly passed by the city council, was approved by the mayor:

"Ordered: That the city treasurer be authorized to borrow, under the direction of the committee on finance, and at such a rate of interest as they shall determine, the sum of $766,000, which sum is hereby appropriated, and the Boston water board is authorized to expend the same for the extension of the high-service works of the Cochituate water department."

On Dec. 31, 1884, the city engineer, Henry M. Wightman, addressed to the water board a letter, in which he said:

"The board should determine the pumping engine it will use, as such determination is necessary before a plan of the pumping station can be made. I am of the opinion that the improved Worthington engine will prove the most advantageous for the city, and as a three-million-gallon engine of this type is running at the Worthington pump works in New York, it would be advisable for the board to examine this engine before any decision is made."

The water board adopted plans and specifications for said extension, requiring, among other things, two engines of the daily capacity of five million and ten million gallons respectively, estimated by said board to cost from $85,000 to $93,000, the discontinuance of

the pumping station on Elmwood street, at the Highlands, and the engines and machinery therein; and on the third day of April, 1885, the Boston water board sent the following communication to the city council:

"The plans for the extension of high service, as detailed by ex-city engineer Joseph P. Davis, and the late city engineer, Henry M. Wightman, require the establishment of a new pumping station at Chestnut Hill, of larger capacity than the present one, at the Highlands, and the discontinuance of the latter. Mr. Wightman, after a careful examination of the matter, concluded that it would
38 be advantageous for the city to exchange if possible the small engines now in use for the larger ones required in the extension of the high service, and so recommended to the board. We therefore ask 'that the water board be authorized to exchange such pumping engines and machinery as are inadequate or of insufficient capacity for those of the capacity required by the plans and estimates of the new high-service extension.'"

On April 20, 1885, the following order, prepared by the chairman of the water board, and which had duly passed both branches of the city council, was approved by the mayor:

"Ordered: That the water board be authorized to exchange such pumping engines and machinery as are inadequate or of insufficient capacity for those of the capacity required by the plans and estimates of the new high-service extension, the expense of such exchange to be charged to the appropriation for high-service extension."

The water board never advertised in any manner for proposals for contracting for or furnishing the engines, boilers and appurtenances required by the plans and specifications for the new high-service extension.

On April 24, 1885, the board received from the plaintiffs a proposal to furnish and erect the pumps for $106,575, and on the same day the board voted to accept and did accept the proposal.

The distinguishing characteristic of the improved or high-duty Worthington engine is a patent "high-duty" attachment, the patent of which is owned and used exclusively by the plaintiffs.

The plaintiffs, though knowing to the ordinance hereinbefore cited requiring advertisements, were informed by the chairman of the Boston water board that the order above cited of April 20, 1885, avoided any necessity of advertising in this case; and on May 19, 1885, the Boston water board, in the name of the defendant, and claiming to act in its behalf, and whose whole authority in the premises, if any it had, was derived from the orders, ordinances and statutes, as hereinbefore stated, and the plaintiffs entered into a contract, the material portions of which were that said plaintiffs should make and erect at Chestnut Hill reservoir two high-duty pumping engines,—one of ten million and one of five million gallons daily capacity,—and the boilers and appurtenances for the same; that the defendant should pay the plaintiffs there-
39 for the sum of $106,575, and the pumping machinery, boilers and all their appurtenances then located in the Highland

pumping station, and valued at $3,500, were to become the property of the plaintiffs. On the same date a bond in the sum of $25,000, with sureties, running to the city of Boston, was delivered to the Boston water board to secure the faithful performance of the contract by the plaintiffs. The bond was accepted for the city of Boston by the Boston water board and attached to the contract, and is now in the possession of the city auditor.

In the year 1877, the Boston water board and Henry R. Worthington contracted for an engine, at a cost of $20,000 without advertising therefor, and the price stipulated therein was paid by said city.

Ambrose A. Ranney and William R. Howland, for plaintiffs; Andrew J. Bailey, city solicitor, for defendant.

Opinion of the Court.

(January 11, 1890.)

COLT, *J.*:

Upon the foregoing statement of facts the question is presented whether the city of Boston is liable on the contract made by the water board with the plaintiffs. On behalf of the city it is insisted that the powers of the board are limited by the terms of the ordinance, that the ordinance requires the board to advertise for proposals where the contract involves an expenditure of more than $10,000, and that the board having neglected to do this the contract made was not the contract of the city, and is not binding upon it. As a general legal proposition this is sound, and supported by authority. Brady *v.* Mayor of New York, 20 N. Y. 312; Mayor of Baltimore *v.* Eschbach, 18 Md. 276; Dibble *v.* New Haven, 56 Conn. 199; The Floyd Acceptances, 7 Wall., 666; Lowell Savings Bank *v.* Winchester, 8 Allen, 109; Palmer *v.* Haverhill, 98 Mass. 487; Petitions of Laura E. Eager, 46 N. Y. 100; Nicholson Pavement Co. *v.* Painter, 35 Cal. 699; Zottman *v.* San Francisco, 20 Cal. 96; Dean *v.* Charlton, 23 Wis. 590.

Is there anything in the special facts of this case to take it out from the operation of the general rule? The contention of the plaintiffs is that the order of April 20, 1885, which passed both branches of the city council and was approved by the mayor, and which authorized the exchange of pumping engines to be made, gave the board authority to make the exchanges without advertising for proposals. If this were otherwise it is said that it would have been a foolish and unnecessary act to have passed any such order. It is also pointed out that the ordinance provides that the city council may from time to time, by order or resolution, instruct the board, and change and limit their powers, and it is claimed that the council acting under this provision passed the special order of April 20, with the intention of taking this particular transaction outside of the operation of the general ordinance. This line of argument has some force, but I do not think it should prevail in this case for the following reasons: If we turn to the ordinance we find that the board may, subject to the approval of the mayor, sell or

lease the property connected with the water works as they may deem expedient. Here was a case, however, where property was to be exchanged, and the board might well say that while we have the power, subject to the approval of the mayor, to sell or lease the property of the water works, we have no specific authority conferred on us to exchange such property, and, therefore, in order that no question may arise as to our power to act in the premises we will obtain an order from the city council. It seems to me that the proper construction to give to the order of April 20, is that it was passed to supply any possible deficiency in the power of the board to make the proposed exchange, and that it was not designed as a special ordinance to be acted upon outside of and independ-
41 ently of the provisions of the general ordinance. Upon no sound principle of statutory construction can it be said that the act of April 10 operated to repeal the general ordinance relating to the powers of the board. So far as it changed or repealed the ordinance, it should be held to be operative. So far as it did not change or repeal the ordinance, its provisions remain in full force and effect. I am of opinion, therefore, that the act of April 10 was not intended to, and did not relieve the board from the necessity of advertising for proposals in this case.

The second ground upon which the plaintiffs base their right of recovery is that the Worthington pump being patented, there was no necessity to advertise for proposals. I do not think, however, that the circumstance that the Worthington pump embodied an attachment which was patented relieved the board from the necessity of advertising. In the cases referred to by the plaintiffs, Yarnold *v.* City of Lawrence, 15 Kan., 126; Hobart *v.* Detroit, 17 Mich., 246; Attorney General *v.* Detroit, 26 Mich., 263; *In re* Dugro, 50 N. Y., 513, we find that an advertisement for bids was made in each instance, except in the case of Yarnold *v.* City of Lawrence, and there the court held that by the terms of the statute the city was not required to advertise. The form in which this question has usually been presented, and upon which there is a conflict of authority, is whether a city has a right to avail itself of a patented invention in the improvement of its streets where the law requires the letting of contracts to the lowest bidder. Upon this question the adjudications are not uniform, as will be seen by comparing the cases already cited with the following: Nicholson Pavement Co. *v.* Painter, 35 Cal., 699; Zottman *v.* San Francisco, 20 Cal., 96; Dean *v.* Charlton, 23 Wis., 590; Burgess *v.* City of Jefferson, 21 La. An., 143.

The ground upon which the courts held that the city has no right to accept a patented article where the law requires a
42 letting to the lowest bidder, is that the law means that there should be a competition among bidders, and that in the case of a patented invention there is no competition.

It is urged by the plaintiffs that by the terms of the ordinance the board were not obliged to accept the lowest bidder, and therefore, having determined upon the Worthington pump, it was useless to advertise for bids. However this may be in this particular

case, I think it would be a dangerous principle to establish, that because one feature of an article which the city desired was patented, the board thereby can waive the requirement of advertising and the advantages of publicity, and secretly make their own selection. Even though a thing may be patented, it may form a subject of competition, because there may be numerous licensees under the patent. The ground upon which I decide against the plaintiffs on this point, is that the ordinance obliged the board to advertise for proposals, and that it was beyond their power to waive or dispense with this requirement, and that, therefore, the contract which was made and upon which the plaintiffs rely was void.

Judgment for defendant.

43 The following is the assignment of errors filed by the plaintiffs to be transmitted with the record herewith:

Circuit Court of the United States, District of Massachusetts.

CHARLES C. WORTHINGTON *et al.*
v.
CITY OF BOSTON. } No. 2660, Law Docket.

Assignment of Errors.

(Filed June 6, 1890.)

The plaintiffs in error in said cause hereby claim and assign as errors for the purposes of a writ of error the following, to wit:

1. The plaintiffs say that the court erred in that it did not rule and hold upon the agreed statement of facts and the facts found by the court that they were entitled to recover and give judgment for them in the sum agreed upon as damages in that event, with
44 interest thereon, as stipulated, and in denying the plaintiffs' claim in that behalf.

2. The court erred in finding and giving judgment for the defendant upon the agreed facts and the facts as found by it as against the plaintiffs' claim upon the same.

3. The court erred in holding and ruling, as against the plaintiffs' claim to the contrary and as contended by the defendant, that the contract sued and relied upon was void, upon the facts agreed upon and found, because there was no advertising for proposals.

4. The plaintiffs claimed and the court erred in not holding upon the agreed statement of facts and the facts found, especially by reason of the order of the city council of April 20, 1885, and approved by the mayor, and in view of the ordinance and other orders and facts found, that it was not essential to the validity of the contract made that proposals for the contract of exchange of pumps should be advertised.

5. The court erred in not holding, as was claimed by the plaintiffs, that the order of April 20, 1885, had the effect of dispens-
45 ing with the advertising for proposals in view of the provisions of the ordinances to the effect that the city council

might from time to time, by order or resolution, instruct the board and change and limit their powers; that the orders passed had that operation, and advertising for proposals was thereby not made absolutely essential to the validity of any contract that might be made and to the one which was made for the authorized exchange of pumps.

6. The court erred in refusing to hold and in not ruling that the order of April 20, 1885, was a substantive and comprehensive authority for the exchange of pumps contemplated and the contract therefor as made independently of the provisions of the ordinance in respect to advertising for proposals as a matter not covered by said provisions of said ordinance; that the ordinance did not apply to or cover the case of an exchange of properties; that if it did the said order took the contemplated transaction of exchange out of the operation of the ordinance with full provisions made therefor otherwise.

7. The court erred in not holding and ruling that the order
46 of April 20, 1885, took the present transaction in particular out of the operation of the ordinance, if same applied, although it was not designed to repeal or amend the ordinance in general.

8. The court erred in not holding and ruling that it was not essential to the validity of the contract to be made and actually made that proposals should be advertised for, and that the contract as made was valid, because the ordinance did not require the board to accept the lowest bid made or any bid made if they did advertise, nor require the board to advertise again if all the bids made were rejected; and also, inasmuch as the Worthington pump was determined upon with letters patent held therefor or an essential feature or attachment thereof which were owned by the plaintiffs with no one else having a right to make, use, contract, or dispose of the same without their leave, that advertising for proposals under such circumstances would have been futile and useless and was not absolutely required.

9. The plaintiffs say that the court erred in making each one of the rulings and refusals to rule set forth in and made the subject of exceptions on the part of the plaintiffs, as set forth in detail
47 in the bill of exceptions of record and allowed by the court, whether fully covered or correctly indicated in the foregoing or not.

Wherefore the plaintiffs pray, for the reasons set forth, that the judgment for the defendant may be reversed.

A. A. RANNEY.
MORSE & ALLEN.

48 *Clerk's Certificate.*

UNITED STATES OF AMERICA, *Massachusetts District*, } ss:

I, John G. Stetson, clerk of the circuit court of the United States for the first circuit and district of Massachusetts, certify that the foregoing is a true copy of the record of said circuit court in the cause entitled—

CHARLES C. WORTHINGTON, *et al.*, Plaintiffs, *v.* CITY OF BOSTON, Defendant. } No. 2660, Law Docket.

lately determined in said circuit court, and of all proceedings therein and of the opinion of the court and of the assignment of errors and prayer for reversal filed therein.

In testimony whereof I hereunto set my hand and affix the seal of said circuit court, at Boston, in said district, this first day of October, in the year of our Lord one thousand eight hundred and ninety, and of the Independence of the United States the one hundred and fifteenth.

Seal of the Circuit Court, Massachusetts.

JOHN G. STETSON, *Clerk.*

49 *Bond on Writ of Error.*

Know all men by these presents that we, Charles C. Worthington and William A. Perry, of the city, county, and State of New York, as principals, and Thomas Cunningham and James M. Betton, both of Boston, in the county of Suffolk and Commonwealth of Massachusetts, as sureties, are held and firmly bound unto The City of Boston, a municipal corporation, duly organized under the laws of the State of Massachusetts, in the full and just sum of three hundred dollars, to be paid to the said City of Boston, its certain attorney or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated the twenty-fourth day of May, in the year of our Lord one thousand eight hundred and ninety.

Whereas lately, at a circuit court of the United States for the first circuit and district of Massachusetts, in a suit depending in said court between said Charles C. Worthington and William A. Perry, plaintiffs, and said City of Boston, defendant, judgment was rendered against the said plaintiffs, and the said plaintiffs having procured a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said City of Boston, citing and admonishing it to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next:

Now, the condition of the above obligation is such that if the said plaintiffs shall prosecute their said writ of error to effect and answer all damages and costs if they fail to make their plea good, then the above obligation to be null and void; otherwise to remain in full force and virtue.

CHAS. C. WORTHINGTON. [L. S.]
W. A. PERRY,
By C. C. WORTHINGTON, [L. S.]
Att'y-in-fact.
THOS. CUNNINGHAM. [L. S.]
JAMES M. BETTON. [L. S.]

Signed, sealed, and delivered in presence of—
B. W. PIERSON.

Approved:
LE BARON B. COLT,
U. S. Circuit Judge.

A true copy of the bond taken by the judge at the time of allowing the writ of error named in said bond, which bond is on file in the office of the clerk of the circuit court of the United States for the first circuit and district of Massachusetts.

[Seal of the Circuit Court, Massachusetts.]

Attest: JOHN G. STETSON,
Clerk U. S. C. C., Mass. Dist.

Endorsed on cover: Case No. 14,358. Massachusetts C. C. U. S. No. 312. Charles C. Worthington and William A. Perry, plaintiffs in error, *vs.* The City of Boston. Filed October 20, 1890.

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CLERK.

IN THE

Supreme Court of the United States.

October Term, 1893.—No. 312.

CHARLES C. WORTHINGTON AND WILLIAM A. PERRY, Plaintiffs in Error,

vs.

THE CITY OF BOSTON.

Error to the Circuit Court of the United States for the District of Massachusetts.

BRIEF FOR PLAINTIFF IN ERROR.

GEORGE F. EDMUNDS,
Of Counsel.

McGILL & WALLACE, Law Printers, Washington, D. C.

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vs.

THE CITY OF BOSTON.

No. 312.

Error to the Circuit Court of the United States for the District of Massachusetts.

BRIEF FOR PLAINTIFFS IN ERROR.

STATEMENT.

The sole question is, whether the agreement made April 24, 1885, between the Water Board of Boston and the plaintiffs (R., p. 9, ff. 17–18) was legally valid when made.

No point or suggestion was made to the court below of any ground of defense, other than that the Water Board did not advertise for proposals before making the agreement sued upon, and referred to above. The facts appear in an agreed statement. (R., pp. 5–12.)

A condensed statement may be made as follows: The City Council had lawful authority to provide for a supply of water in any way it thought fit. (Laws of Mass, 1821, c. 110, s. 16; Laws, 1854, c. 448, ss. 35–39.) By the act of 1875 (c. 80, s. 1) the City Council was authorized to appoint a "Boston Water Board." The act also provided that:

"The City Water Board may be empowered by said City Council to exercise all or any of the powers conferred by the statutes of the Commonwealth upon the city of Boston with reference to supplying said city with water, or of the Cochituate and Mystic Water Boards; and also to act as the agent of the city of Boston in doing any and all things which the city is now authorized to do in relation to the taking of lands, water rights, and other property, and the establishment and maintenance of works and appliances for supplying the city of Boston or other cities and towns with pure water; and the said Boston Water Board shall, so far as the City Council of said city may by ordinance prescribe, succeed to all the powers and duties formerly vested in the Cochituate Water Board and the Mystic Water Board."

Under this authority the City Council, on the 22d of March, 1876, passed the ordinance in force at the time of making the contract in question, as follows:

"There shall be a Board, to be known as the Boston Water Board, and to consist of three members. Said Board shall have and exercise all the powers, so far as such powers can be legally delegated by the City Council, which were granted to the city by, or are held by, the city under chapter 167 of the Statutes of the Commonwealth of the year 1846, chapter 177 of the said Statutes of the year 1872, and by or under any and all Statutes in addition to either of the before-mentioned chapters; subject, however, to the authority of the City Council from time to time by ordinances, orders, or resolutions to instruct said Board and to change and limit their powers."

The Statutes of 1846 and 1872 referred to are, so far as material, as follows:

The Statutes of 1846 gave the city full power to provide water-works and to appoint commissioners to manage the business. It is unnecessary to quote the Statute at length.

The Statutes of 1872 provided for extending the water-works through the agency of the Cochituate Water

Board with full powers over the whole subject. These Statutes are substantially superseded in respect of all detail, by the act of 1875, chapter 80, as quoted. (R., p. 6., f. 13.)

The same ordinance provided in a later clause that:

"No contract or purchase which is estimated to involve an expenditure of more than $10,000, except a contract for the laying of pipe, shall be made by the Board until they have advertised, as hereafter provided, for sealed proposals therefor. When advertisements for such proposals are made, plans and specifications of the work to be done and schedules of materials or supplies to be furnished, shall be placed on file in such office as may be designated by the Board, and shall at all times during office hours be open for public inspection.

It then provides for the number of advertisements, and also provides that:

"Each proposal shall conform to the specifications and requirements of the advertisement," &c.

It also provided for the public opening of proposals, and that—

"The said Board may reject any or all bids which are offered, and it shall be their duty to reject the bids of all irresponsible parties."

The water works in question were confessedly within the scope of the powers of the City Council and the Water Board. (R., p. 7.)

In this state of the law and ordinances, the City Council, on the 23d of December, 1884, on the report of the Water Board, authorized the city to borrow $766,000, and authorized the Water Board to expend the same for the "extension of the high-service works," &c. (R., p. 8, fol. 16.)

On the 31st of December, 1884, the city engineer, Mr. Wightman, reported to the Water Board on the subject of this extension that—

"The Board should determine the pumping engine it will use, as such determination is necessary before a plan of the pumping station can be made. I am of the opinion that the improved Worthington engine will prove the most advantageous for the city, and, as a 3,000,000 gallon engine of this type is running at the Worthington Pumping Works in New York, it would be advisable for the Board to examine this engine before any decision is made." (R., p. 8, f. 16.)

The Water Board adopted plans and specifications for the extension, requiring two engines of a daily capacity of 5,000,000 and 10,000,000, gallons respectively, and the discontinuance of the pumping station on Elmwood street, at the Highlands, and the engines and machinery therein. They then sent a communication to the City Council on the subject on April 3, 1885, stating that plans for the extension of the high service, as made by Mr. Wightman and the then city engineer, required the establishment of a new pumping station at Chestnut Hill of larger capacity than the one at the Highlands, and the discontinuance of the latter; and they stated to the Council that Mr. Wightman, after a careful examination, had concluded that it would be advantageous for the city to exchange, if possible, the small engines now in use for the larger ones required, and they so recommended. The Board then stated that—

"We, therefore, ask that the Water Board be authorized to exchange such pumping engines and machinery as are inadequate or of insufficient capacity, for those of the capacity required by the plans and estimates of the new high-service extension."

Thereupon, on the 20th of April, 1885, the City Council passed an order as follows:

"*Ordered:* That the Water Board be authorized to exchange such pumping engines and machinery as are inadequate or of insufficient capacity, for those of the capacity required by the plans and estimates of the new

high-service extension, the expense of such exchange to be charged to the appropriation for high-service extension."

Thereupon the Water Board, without advertising for proposals, proceeded on the next day, April 21, 1885, to New York and examined the improved or high-duty Worthington engine and other engines. (R., pp. 8, 9.)

The Worthington pump desired for this extraordinary high service was a patented device "*owned and used exclusively by the plaintiffs.*" (R., p. 10, f. 18.)

Having so investigated the whole subject, the chairman of the Water Board suggested to the plaintiffs to make a proposal to accomplish the end in view; and accordingly, on the 24th of April, 1885, the plaintiffs submitted a proposal to do the work required and make the exchange of engines in accordance with the recommendation of the City Engineer as hereinbefore mentioned; and on the same day the Water Board voted to return, and did return, an answer to the proposal, accepting it. (R., p. 10, ff. 17, 18.)

The plaintiffs knew of the general ordinance in respect of advertisements, but they were informed by the chairman of the Water Board that the order before mentioned, of April 20, 1885, avoided any necessity for advertising. (R., p. 10, f. 19.) Accordingly a contract was concluded for the plaintiffs' building and erecting two of their high-duty pumping engines of the capacity of 10,000,000 and 5,000,000 each, &c., and to receive in exchange and part compensation therefor the pumping machinery, boilers, and all appurtenances of the old Highlands pumping station. (R., p. 10.)

Payments were to be made by instalments, and a proper bond was given by the plaintiffs for the faithful performance of the contract. (R., p. 11.)

The plaintiffs proceeded to execute the contract in every respect according to its letter and spirit to the ex-

tent of becoming entitled to be paid 65 per cent. of the contract price, and were ready and willing to deliver the engines and boilers and complete the work, when the defendant refused to receive the same or to pay any of the instalments, and repudiated the contract. (R., pp. 11, 12.)

The same Water Board had in the year 1877 obtained an engine at an expense of $20,000 by contract with Worthington, without advertisement, which was duly paid for by the city. (R., p. 12.)

The stipulated damages in case the plaintiffs should be found entitled to recover were $35,000. (R., p. 12.)

Assignment of Errors.

The judgment below should have been for the plaintiffs for the stipulated amount of damages, with interest and costs, instead of being a judgment for the defendant.

Points.

I. The *statutes* of Massachusetts did not require any advertisement for work of this character in any case.

II. The City Council had as complete authority over the subject as any private person would have over his own business. It was not bound to create any Water Board at all, but it was authorized to do so in its discretion.

III. If it chose to establish such a Board it was authorized to bestow upon it the power to exercise all or any of the powers theretofore possessed by the city, &c., and to empower the Board to act as the agent of the city in doing everything in relation to the subject.

A literal, and probably a wholesome, construction of this statute is that all the Council could do, if it estab-

lished a Board at all, was to give it the powers itself possessed, or such of them (not all) which itself possessed and chose to give; and that, so far as powers were given, they were complete and independent, under the statute, of any limitation or special regulation by the Council. In this view the provision of the Council turning over to the Water Board the complete control of the subject, that they must make contracts, &c., under a particular species of advertisement, was not valid, and the Board had a right to exercise its own discretion and under its own responsibility in that direction.

IV. But if the true construction of the statute be that the Water Board was the mere creature and agent of the City Council, subject in all respects to its control and direction as the ordinance provided, then we have the case of a principal delegating to its agent a general authority for the general management of business, with an instruction in respect of contracts and purchases beyond a certain limit, that there should be advertisement for proposals, and with the provision that the agent might "reject any or all bids which are offered," and that it should be "their duty to reject all the bids of all irresponsible parties."

We thus have a general authority, with a general modus of its exercise in respect of advertisement, and a general final authority after such advertisement, to take the highest and reject the lowest bid, if in good faith the agent should think it best.

We then have, secondly, in the same ordinance of the Council, a provision that the Water Board shall be subject to the authority of the City Council "from time to time by ordinances, orders, or resolutions to instruct said Board, and to change and limit their powers."

V. The whole case, then, in this aspect is one of a general agency, under general instructions, with a com-

plete power of control by the principal in such special instances as it might think fit in departing from the general instructions, as the occasion should seem to require.

VI. It is submitted that it is perfectly plain that the City Council, being informed by its agent (the Water Board) that the City Engineer and the Board itself were of opinion that the peculiar and extraordinary service in view required the use of the engines which could be obtained only from the plaintiffs—who, as the case shows, were the sole and exclusive proprietors and users of that particular device—adopted the order of the 20th April, 1885, for the very purpose of accomplishing the very arrangement that was made by the Water Board with the plaintiffs.

It is impossible to put any other construction of common sense upon its action. The authority of the Water Board was already complete to do everything in respect of improving the high-water service; but it would be open to the question whether it could do it by a contract with the plaintiffs under the general authority requiring advertisement.

We are unable to see that the suggestion of the learned judge below, that this special order was made to authorize a disposition of the old engines without the approval of the mayor, has any force whatever. That clause in the general ordinance has no application to the subject that the City Council and the Water Board had in hand. But if it had, a power to sell imports in every form of legal definition, a power to exchange, that is, to receive the consideration of the sale in some other property. But, we repeat, that the general authority of the Board to enter into the arrangements in question is absolutely complete under the language of the ordinance, subject to the duty of advertising in an ordinary case. There-

fore, the action of the Council by a special order on the very subject in hand and on the very report of the Board, and in respect of obtaining the very engines which could be obtained from no other source, was designed to authorize and confirm in advance the arrangement that was contemplated with the plaintiffs, and which had been recommended as stated in the case.

VII. It is not contended that the special order of the Board operated as a repeal of the general ordinance; quite the reverse. It is contended that advertisement being generally required, and the Council in establishing the Board having made special provision for giving special instructions to the Water Board from time to time, these special instructions were in entire harmony with the general provision, and only took this particular case out the standing ordinance because it was one to which the standing ordinance could not be, and ought not properly to be, applied.

The Council, then, having complete authority to make this arrangement without advertisement and in its own discretion, and there being no law requiring any advertisement, had complete power to authorize the Board to make the exchange, which, confessedly, the Council did do. In every such case, where the whole question of doing justice is free from any statutory limitation, and depends, as in the case of a private agency, upon what was the will of the Council, it is submitted that there is no room for doubt, upon the case stated, that the contract was valid without a previous advertisement.

VIII. It is submitted, also, that inasmuch as the Water Board had complete general authority over the whole subject of increasing and improving the water service according to its own discretion, unless interfered with by the Council, it might have made the contract with the

plaintiffs that it did make for these special machines, which nobody else could make or had the right to make, without the aid of the special order of the 20th of April, 1885; for every such general requirement imposed upon an agent having general authority for the transaction of the business of his principal, when it would, applied to the particular transaction, be absurd and absolutely useless, must be taken upon ordinary principles to be inapplicable to such a particular case.

Indeed, under the very letter of the advertising provision, if an advertisement had been made, it would have been entirely competent, and, under the circumstances stated in this case, the duty of the Water Board to have rejected every bid except that of the plaintiffs, and to have accepted that. It is believed with confidence that the law does not require such absurd preliminaries to a transaction right in itself. This view is fully supported by the observation of the New York Court of Appeals in the matter of Dugro (50 N. Y., 513).

It is true that in cases where the statutes of a State have required municipal or other officers to advertise in respect of matters in their charge, the decisions have not been uniform in respect of dispensing with advertisements in a case where a patented article was the one desired. But those cases are quite different from this, where no law of the State required any advertisement, and where the duty of advertising depended upon the will of the principal, who could act from time to time, and where the doctrines of the relations of principal and agent to the persons with whom they deal have a much wider scope in respect of accomplishing justice.

See Yarnold *v.* The City of Lawrence, 15 Kan., 126; Hobarth *v.* Detroit, 17 Mich., 246; Attorney General *v.* Detroit, 26 Mich., 263; *in re* Dugro, 50 N. Y., 515; Nicholson Pavement Co. *v.* Painter, 35 Cal., 699; Zottman *v.* San Francisco, 20 Cal., 96; Dean *v.* Charlton, 23 Wis.,

590; Burgess *v.* City of Jefferson, 21 La. (Annual), 143—cited by the learned judge below. Some of these cases, however, do not appear to have any bearing upon the question. There is no occasion for comment here upon the other cases cited below. The principles laid down in them are familiar law. This case must be determined upon the just and fair meaning of the action taken by the City Council and by the Water Board, concerning the facts of which there is no dispute.

GEO. F. EDMUNDS,
Of Counsel for Plaintiff in Error.

Office Supreme Court U.S.
FILED.
MAR 19 1894
JAMES H. McKENNEY,
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1893.

CHARLES C. WORTHINGTON ET AL.

v.

THE CITY OF BOSTON.

DEFENDANT'S BRIEF.

I.

The ordinances cited (third clause, Statement of Facts) provides that the Boston Water Board shall not make any contract estimated to involve more than ten thousand dollars until it has advertised for proposals therefor, and all persons having to do with the City must take notice of the ordinance.

Heland *v.* Lowell, 3 All. 408.

Taylor *v.* City of Lambertville, N.J., Oct. 22, 1887, Vol. 10, Atlantic Rep. 809.

II.

The Boston Water Board not having complied with this ordinance, the contract made by it was not the contract of the City, and is not binding upon it.

Brady *v.* Mayor of New York, 30 N.Y. 312.

Nicholson Pavement Co. *v.* Painter, 35 Cal. 699.
Zottman *v.* San Francisco, 20 Cal. 99–102.
Deon *v.* Charlton, 23 Wis. 590.
Dolan *v.* Mayor of New York, 4 Abb. Pr. (N.S.) 397.
Floyd Acceptances, 7 Wall, 676.
Petn. of Laura E. Eager *et al.*, 46 N.Y. 100.
Lowell Savings Bank *v.* Winchester, 8 All. 109.
Palmer *v.* Haverhill, 98 Mass. 487.
Mayor of Baltimore *v.* Erbach, 18 Md. 282.
Dibble *v.* New Haven, 56 Ct. 199.
Salem Bank *v.* Gloucester Bank, 17 Mass. 29.
Moran *v.* Commrs. of Miami County, 2 Blk. 725.
Agawam Natl. Bank *v.* South Hadley, 128 Mass. 506.
McChose *v.* Township of Oxford, 94 N.S. 429.
Horton *v.* Thompson, 71 N.Y. 513.

III.

The fact stated in the sixteenth clause of the Statement of Facts has no bearing on this case.

Butler *v.* Charlestown, 7 Gray, 12.
Sikes *v.* Hatfield, 13 Gray, 347.

IV.

The order (ninth clause, Statement of Facts) did not annul or repeal the ordinance cited in the third clause.

Third Natl. Bank *v.* Harrison, 8 Fed. Rep. 721.
Chicago, etc., Ry. Co. *v.* U.S., 127 U.S. 405.
U.S. *v.* Benson, 31 Fed. Rep. 896–899.
Chew Heong *v.* U.S., 112 U.S. 536–549.
Gilson *v.* Emery, 11 Gray, 430.

V.

Nor can there be any claim of a ratification by the City.
Tarney *v.* Bridgeport, 55 Ct. 412.

ANDREW J. BAILEY,
For Defendant.

Transcripts
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1893

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